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NO. 1248

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

JUNIUS GUILLORY, *Petitioner*

v.

LEVINGSTON SHIPBUILDING CO., *Respondent*

On Petition For A Writ of Certiorari To The Court of Civil Appeals For The Ninth Supreme Judicial District of Texas

BRIEF FOR RESPONDENT IN OPPOSITION

JOHN D. RIENSTRA, JR.
JOHN D. RIENSTRA
707 Beaumont Savings Building
Beaumont, Texas, 77701
Attorneys for Respondent

Alpha Law Brief Co., M & M Bldg., Houston, Texas 77002

SUBJECT INDEX

	Page
Reported Opinion	1
Jurisdiction	1
Questions Presented	2
Statute Involved	2
Reasons for Denying the Writ	3-11
Applicability of Reed v. Yaka, 373 U.S. 410 (1963) and Jackson v. Lykes Bros. S.S. Co., 386 U.S. 731 (1967)	3-6
Status of the vessel involved and nature of the work being performed by Petitioner	7-11
Conclusion	12
Proof of Service	12
Appendix A—33 U.S.C. 905, Longshoremen's and Harborworkers' Compensation Act	13
Appendix B—Work Order	14-16

INDEX OF AUTHORITIES

CASES	Page
Berge v. National Bulk Carriers Corp., 251 F.2d 717 (2nd Cir. 1958)	11
Desper v. Starved Rock Ferry Co., 342 U.S. 187 (1952)	8
Halapeska v. Callihan Interests, 371 S.W.2d 368 (1963)	5
Jackson v. Lykes Bros. S.S. Co., 386 U.S. 731 (1967)	3, 4, 5, 6
Lawlor v. Socony-Vacuum Oil Co., 275 F.2d 599 (2nd Cir. 1960)	11

CASES

	Page
Mitchell v. Trawler Racer, 362 U.S. 539 (1960)	6
Reed v. The Yaka, 373 U.S. 410 (1963)	3, 4, 5, 6
Ryan Stevedoring Co. v. Pan Atlantic S.S. Co., 350 U.S. 124 (1956)	6
Sanderlin v. Old Dominion Stevedoring Corp., 385 F.2d 79 (Fourth Circuit, 1967)	6
Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946)	3, 5, 7
Smith v. Henger, 148 Tex. 456 (1950)	5
United New York & New Jersey Sandy Hook Pilots Ass'n v. Halecki, 358 U.S. 613 (1959)	2, 10
Watson v. Gulf Stevedoring Co., 374 F.2d 946 (Fifth Circuit, 1967)	6
West v. United States, 361 U.S. 118 (1959)	8, 9

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OPINION BELOW

The opinion of the Court of Civil Appeals (Appendix C of Petition) is reported at 433 S.W.2d 515.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

May an employee maintain a suit against his employer for injuries sustained while working as a repairman on board a vessel not under charter to said employer or owned by him in view of 33 U.S.C. 905?

Is "gas freeing" a vessel in drydock work traditionally performed by seamen within the meaning of *United New York & New Jersey Sandy Hook Pilots Ass'n. v. Halecki*, 358 U.S. 613 (1959)?

Was the tug "Lou Ann Ellis" out of navigation at the time of Petitioner's injury?

STATUTE INVOLVED

33 U.S.C. Sec. 905 "Longshoremen's & Harborworkers' Compensation Act," printed in Appendix A.

STATEMENT

Petitioner, Junius Guillory, was injured when he inhaled gas fumes while working on the tug "Lou Ann Ellis", then situated on a marine railway at Respondent's shipyard. Petitioner was an employee of Respondent who was at all material times a subscriber under the Longshoremen's & Harborworkers' Compensation Act, 33 U.S.C. Sec. 901, *et seq.*, and the Texas Employers' Liability Act, Texas Rev. Civ. Stat. Ann., Article 8306 *et seq.*

The "Lou Ann Ellis" was owned by Harms Marine Service, not a party to this suit, and had been brought to Respondent for general repairs, the nature of which are reflected by a work order reproduced herein as Appendix B.

The jury found in response to special issues that Respondent was negligent in failing to furnish Petitioner with a gas mask (Tr. 23), and that the "Lou Ann Ellis" was unseaworthy. (Tr. 25-26).

After the verdict of the jury was returned, the trial court entered judgment for Respondent *non obstante veredicto* (Tr. 35), upon all of the grounds urged in Respondent's Motion (Tr. 30-33).

Petitioner brought this suit upon the theory that Respondent's control of the "Lou Ann Ellis" for the purpose of making repairs placed Respondent in the legal position of the owner of the vessel.

ARGUMENT

1. *Reed v. The Yaka*, 373 U.S. 410 (1963) and *Jackson v. Lykes Bros. S.S. Co.*, 386 U.S. 731 (1967) are not applicable to the facts of this case.

The sole reason advanced by Petitioner for granting certiorari in this case is that Respondent owed him a maritime duty under this Court's decisions in *Reed v. The Yaka*, 373 U.S. 410 (1963) and *Jackson v. Lykes Bros. S.S. Co.*, 386 U.S. 731 (1967), notwithstanding the plain language of 33 U.S.C., Sec. 905, and despite the fact that Respondent at no time had any ownership interest in or operational control of the "Lou Ann Ellis."

At least since *Seas Shipping Co. v. Sieraki*, 328 U.S. 85 (1946), owners and charterers of vessels have owed a maritime duty to shoreside workers doing the ship's service.

And in *Reed v. Yaka*, 373 U.S. 410 (1963) and *Jackson v. Lykes Bros. S.S. Co.*, 386 U.S. 731 (1967)

this duty was imposed notwithstanding Sec. 905 of the Longshoremen's & Harborworkers' Compensation Act, on the basis that it was not the intention of Congress in enacting that statute to deprive men doing the ship's service of their maritime remedies merely because the owner of the vessel was coincidently their employer.

But here, unlike *Yaka* and *Jackson,* Respondent's sole connection with the "Lou Ann Ellis" was by virtue of an agreement with her owners to make certain repairs. Respondent neither owned the vessel, had her under lease or charter, nor had any operational interest at all in the vessel. This Court said in *Reed v. The Yaka:*

> "* * * full possession and control of the vessel are delivered up to the charterer for a period of time. The ship is then directed by its master and manned by his crew; it makes his voyages and carries the cargo he chooses. Such services performed on board the ship are primarily for his benefit." 373 U.S. at 412.

With respect to the "Lou Ann Ellis", Respondent manned it with no crew, made no voyages and carried no cargo. Indeed, the services performed pursuant to the work order were not for Respondent's benefit, but were solely for the benefit of Harms Marine Service, the owner.

Under such circumstances, Respondent owed no maritime duties with respect to the tug. In the usual case these duties—seaworthiness and due care—are solely those of the owner or operator of the vessel, and as to seaworthiness, the duty is nondelegable and can not be discharged by temporarily surrendering control of the vessel to another.

In *Yaka* this Court observed that had a nonemployee stevedore been injured under the same circumstances as was Reed, such stevedore could clearly have recovered under *Seas Shipping Co. v. Sieracki,* 328 U.S. 85 (1946) and its progeny. But under the facts here, such stevedore would have no cause of action against Levingston under the seaworthiness doctrine for the reason that, Levingston having no operational interest in the vessel, would owe no such duty.

In such a situation, the injured workman would have a cause of action against Levingston which would be governed by the traditional common law rules applicable to invitees injured on the premises of another. See *e.g., Smith v. Henger,* 148 Tex. 456 (1950); *Halapeska v. Callihan Interests,* 371 S.W.2d 368 (1963).

In *Yaka* and *Jackson,* the Court relied on the fact that it would be harsh to "distinguish between liability to longshoremen injured under precisely the same circumstances because some draw their pay directly from a shipowner and others from a stevedoring company doing the ship's service". 373 U.S. at 415. In the instant case, however, if the Longshoremen's & Harborworkers' Compensation Act did not exist at all, there would be no distinction as to liability or remedy; and the effect of the Longshoremen's & Harborworkers' Compensation Act is not, as in *Yaka,* to cut off a maritime remedy, but to eliminate one that previously existed at common law subject to the corresponding defenses of fellow servant and assumed risk.

Moreover, to extend *Yaka* to a situation such as this would plainly destroy Sec. 905 of the Longshoremen's & Harborworkers' Compensation Act. It is true of course that the protection afforded by that section is less than

complete in light of *Ryan Stevedoring Co. v. Pan Atlantic S.S. Co.*, 350 U.S. 124 (1956) and *Reed v. Yaka*, 373 U.S. 410 (1963). But to say that control of the vessel alone places a ship repair company in the position of an owner would clearly render Sec. 905 an empty shell; for most, perhaps all stevedore and repair companies take "control" of the vessel for the purpose of doing their work.

If nonoperational "control" is sufficient to impose maritime obligations, it is difficult to see why a longshoreman engaged in loading or unloading a vessel could not likewise recover directly against his employer.

A ship repair company, it must be noted, is given control of a vessel for the express purpose of making such vessel seaworthy, and repairs are made to the end that the owner's absolute and nondelegable duty will be discharged. *Mitchell v. Trawler Racer*, 362 U.S. 539 (1960). It would indeed be strange if the shipyard engaged to do the work could be held responsible for the very conditions that it is called upon to correct by virtue of its contract with the vessel owners.

The Petition for Writ of Certiorari should be denied. This case does not involve the allocation of losses between the shipping industry and stevedore companies as was true in *Sanderlin v. Old Dominion Stevedoring Corporation*, 385 Fed.2d 79 (Fourth Circuit, 1967), but involves the duties owed by a ship repair company to its employee. Absent the considerations present in *Reed v. Yaka*, 373 U.S. 410 (1963) and *Jackson v. Lykes Brothers S.S. Co.*, 386 U.S. 331 (1963), these duties are and should be controlled by 33 U.S.C., Sec. 901, et seq.[1]

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1. Indeed, in *Watson v. Gulf Stevedoring Company*, 374 F.2d 946 (5th Cir. 1967, Certiorari denied 389 U.S. 927 (1967, recovery was

2. PETITIONER WAS NOT ENGAGED IN WORK TRADITIONALLY PERFORMED BY SEAMEN, NOR WAS THE "LOU ANN ELLIS" IN NAVIGATION AT THE TIME OF HIS INJURY.

The "Lou Ann Ellis" was brought to the Levingston yard on September 6, 1966, for major repairs (S.F. 88-89, 91). The work order, which was introduced into evidence (S.F. 180) provided in part:

> "Furnish labor and facilities to drydock vessel for underwater examination and repair. Hold on dock vessel. * * * Furnish labor and equipment to crop propeller nut keepers, remove propeller from vessel. * * * Furnish labor and facilities to disconnect port rudder at quadrant. Drop rudder and transfer to machine shop. * * * Furnish labor and equipment to break inboard couplings and unship port propeller shaft."

The tug was hauled out of the water on a marine railway on September 8, 1966; the repairs were completed and the tug was placed back into navigation on September 10, 1966 (S.F. 94). While on the ways, none of the tug's crew was aboard, and none of them assisted in the repair work.

Whether, as here, a shore based worker is seeking a maritime remedy under *Seas Shipping Company v. Sieracki,* 328 U.S. 85 (1946) and its progeny, or a member of the crew seeks damages under the Jones Act, the vessel upon which the injury occurs must be in navigation.

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denied an employee in a suit against his employer who was loading cargo aboard a vessel owned by a third party. There the Court noted that 33 U.S.C. Sec. 905, was a complete defense and that the employee's sole and exclusive remedy was against the vessel owner.

Desper v. Starved Rock Ferry Co., 342 U.S. 187 (1952); *West v. U. S.*, 361 U.S. 118 (1959).

For example, in *Desper v. Starved Rock Ferry Co.*, the injured plaintiff was engaged in preparing sightseeing motor boats for launching. These vessels were used on a seasonal basis and withdrawn from navigation in the winter. In a suit under the Jones Act, the Supreme Court held that inasmuch as the plaintiff was not injured while performing duties aboard a vessel in navigation, he was not a seaman and therefore could not recover. The Court reasoned that the Jones Act gave a remedy only under circumstances where the injured party was a "seaman" in the sense that he was one who is exposed to the traditional perils of the sea. When a vessel is withdrawn from navigation even temporarily, seamen traditionally no longer have any duties to perform with respect to it.

Again in *West v. United States*, 361 U.S. 118 (1959) the Court emphasized that maritime remedies extended only to those engaged in seamen's work. In that case, the injury occurred upon a ship that had been withdrawn from navigation but during preparations to restore her to service. In denying recovery under the maritime law, the Court used the following significant language which is particularly appropriate to the case at bar:

> "It is evident that the sole purpose of the ship's being at Atlantic's repair dock at Philadelphia was to make her seaworthy. The totality of the reparation of the vessel included compliance with the hundreds of specifications in the contract calling for the repairing, reconditioning and replacement where necessary of equipment so as to make fit all the machinery, equipment, gear and every part of the vessel.

> Strangely enough, the defective water line and the metal plug specifically pointed to by petitioner as being defective were listed in the specifications for 'cleaning and repairing' and the 'replacement of all defective or missing plugs.'"
>
> * * * *
>
> "On the other hand, the vessels involved in the cases depended upon by petitioner were, at the time of the injuries, in the hands and under the control of the owners or charterers and, instead of undergoing general repairs, were in active maritime service in the course of loading or unloading cargo pursuant to voyages. The workmen, like the seamen, depended upon the seaworthiness of the ships, their equipment and gear. They were obliged to work with whatever the shipowners supplied and it was only fair for the latter to be subjected to the absolute warranty that the ships were seaworthy." 361 U.S. 118, 121.

The "Lou Ann Ellis", on the occasion made the basis of this suit, was as "dead" as the vessel in *West v. United States,* 361 U.S. 118 (1959). As the work order reflects, the repairs to this tug necessitated not only the drydocking of the vessel, but the removal of the rudder and propellers. It is indeed difficult to imagine a situation where a ship is more manifestly withdrawn from navigation than was the case here. Moreover, one of the very purposes for which the "Lou Ann Ellis" happened to be at Levingston was to make her seaworthy, and in addition to other repairs the vessel was to be gas freed and a certificate to that effect furnished to the owner.

Nor was Guillory engaged in work traditionally that of a seaman, which, as hereinafter noted is a prerequisite for recovery under either *Sieracki* or *Yaka.* Seamen do not

now and never did work on vessels which were placed in drydock and stripped of the means of propulsion and steerage. The repair work done on the "Lou Ann Ellis" was the type of work that could only be performed while the vessel was out of navigation and thus incapable of any voyage.

In *United New York and New Jersey Sandy Hook Pilots Association v. Halecki,* 358 U.S. 613 (1959) the pilot boat New Jersey was brought to the shipyard of Rodermond Industries, Inc. for its annual overhaul. Among other things, the ship's generators had to be dismantled and sprayed with carbon tetrachloride, and during this operation Halecki, a shore based electrician, became ill and died from carbon tetrachloride poisoning.

Suit was brought against the owners of the vessel alleging unseaworthiness and negligence. In denying recovery the Supreme Court held that Halecki was not doing work traditionally done by the ship's crew and in this regard placed particular emphasis on the status of the vessel.

> "The work that he did was in no way 'the type of work' traditionally done by the ship's crew. It was work that could not even be performed upon a ship ready for sea, but only when the ship was 'dead' with its generators dismantled. Moreover, it was the work of a specialist, requiring special skill and special equipment—portable blowers, air hoses, gas masks, and tanks of carbon tetrachloride, all brought aboard the vessel for this special purpose, and none connected with a ship's seagoing operations."
>
> * * * *
>
> "It avails nothing to say that the decedent was an 'electrician,' and that many modern ships carry electricians in their crew.

> *Pope & Talbot, Inc. v. Hawn* explicitly teaches that such labels in this domain are meaningless. See 346 U.S. at 413. It is scarcely more helpful to indulge in the euphemism that the decedent was 'cleaning' part of the ship, and to say that it is a traditional duty of seamen to keep their ship clean. The basic fact is, in the apt words of Judge Lumbard's dissenting opinion, in the Court of Appeals, that the decedent 'was not doing what any crew member had ever done on this ship or anywhere else in the world so far as we are informed.' " 358 U.S. 613, 617-618.

It therefore seems clear that inasmuch as Guillory was injured while working on a vessel that was not in navigation at the time and while doing work not traditionally done by seamen, to-wit, gas freeing the ship, he can no more recover than could Halecki, who was doing similar work.

Lawlor v. Socony-Vacuum Oil Company, 275 Fed.2d 599 (2nd Cir. 1960) relied upon by Petitioner is easily distinguishable. For one thing, the vessel involved in the *Lawlor* case was anchored in navigable waters at the time the plaintiff was injured. Moreover, the vessel had a full crew of officers and men aboard, and the claimant, being engaged in repairing leaks, was quite clearly doing work traditionally performed by seamen. See in addition *Berge v. National Bulk Carriers Corporation,* 251 Fed.2d 717 (2nd Cir. 1958).

CONCLUSION

For the above and foregoing reasons it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

JOHN D. RIENSTRA, JR.
JOHN D. RIENSTRA

By: John D. Rienstra Jr
707 Beaumont Savings Bldg.
Beaumont, Texas 77701
Attorneys for Respondent

PROOF OF SERVICE

I, John D. Rienstra, Jr., attorney for Respondent and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served copies of the foregoing Brief in Opposition to the Granting of a Petition for Writ of Certiorari upon Mr. Wiley B. Thomas, Jr., P. O. Drawer U, Angleton, Texas, and Mr. John H. Seale, P. O. Box 480, Jasper, Texas, Attorneys for Petitioner, by mailing three copies thereof, postage prepaid and properly addressed, on this 2nd day of May, 1969.

John D. Rienstra, Jr.
Attorney for Respondent

APPENDIX A

SECTION 905. EXCLUSIVENESS OF LIABILITY

The liability of an employer prescribed in Section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee. Mar. 4, 1927, c. 509, Sec. 5, 44 Stat. 1426.

APPENDIX B

HARMS MARINE SERVICE 9-9-66
TUG "LOU ANN ELLIS"

JOB 1462

1. Drydock:
   Furnish labor & facilities to drydock vessel for under water examination and repair. Hold on dock for completion of underwater work and undock vessel.

2. Propellers:
   Furnish labor & equipment to crop propeller nut keepers, remove propeller nuts and unship port & stbd. propellers from vessel to Levingston Shipbuilding Company truck for transportation to L. L. Walker, in Houston. Propellers to be repaired for owners account. Dial indicate port & stbd. propeller shafts and report findings to owners. Pick up propellers in Houston. Drill pull bolt holes. Deliver to vessel and reinstall as original. Harden up propeller nuts & install flat bar keepers.

Weakley

1462

HARMS MARINE SERVICE
TUG "LOU ANN ELLIS" 9-9-66

JOB 1462

3. Port Rudder:

   Furnish labor & facilities to disconnect port rudder at quadrant. Drop rudder & transfer to machine shop. Crop rudder blade, chuck in lathe and straighten stock. Add approx 10" to lower end of rudder stock and weld out. Reinstall rudder blade as original and connect up to quadrant.

4. Rudder Shoe & Gudgeon:
Furnish labor and material to crop & renew lower angle on rudder shoe approx. 6 × 3 × ⅜ × 5'-0". Fabricate rudder shoe extension from after strut to rudder. Machine new gudgeon and install on shoe to suit rudder pintle.

5. Packing Glands:
Furnish labor & material to repack port & stbd. stern tube packing glands.

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1462

HARMS MARINE SERVICE
TUG "LOU ANN ELLIS" 9-9-66

JOB 1462

6. Port & Stbd. Engines:
Furnish labor & material to align and resecure port & stbd. engines on foundations using fitted bolts.

7. Gasfree:
Furnish labor & facilities to pump water from after void. Washdown & gasfree after void & after fuel tank for hot work.

8. Gasfree Certificate:
Furnish services of certified chemist to check vessel and issue necessary certificate for required hot work.

9. Misc. Fractures & Doublers:
Furnish labor & material to gouge & weld miscellaneous fractures at stern of vessel including struts and install doublers where necessary.

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HARMS MARINE SERVICE
TUG "LOU ANN ELLIS" 9-9-66

JOB 1462

10. Blast & Paint:
Furnish labor & material to sandblast vessel from keel to waterline. Furnish and apply two (2) coats silver primocon & one (1) coat super tropical #2 antifouling.

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HARMS MARINE SERVICE
TUG "LOU ANN ELLIS" 9-9-66

JOB 1462

11. Assist Radar Installation:
Furnish labor to assist in installation of radar unit as requested.

12: Zinc Pads On Fernstrom Coolers:
Furnish labor & material to renew zinc pads on fernstrom coolers as requested by owners representative.

13. Shaft:
Furnish labor & equipment to break inboard coupling and unship port propeller shaft. Accept delivery of owners spare shaft and install as original. (Note-- Item #5 covers repacking of gland).

Weakley

1462